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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 520

JOHN D. BINGAMAN, AS COMMISSIONER OF REVENUE OF THE STATE OF NEW MEXICO, ET AL.,

Appellants,

vs.

GOLDEN EAGLE WESTERN LINES, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO.

STATEMENT OPPOSING JURISDICTION AND MOTION TO AFFIRM.

E. R. WRIGHT,
EARL A. BAGBY,
Counsel for Appellee.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO.

MOTION TO AFFIRM.

Filed October 4, 1935, Nunc pro Tunc as of August 30, 1935.

Now comes the appellee in the above entitled cause and moves that the judgment of the three-judge court, entered on the 9th day of August, 1935, be affirmed, and for grounds of motion shows the Court:

1. It appears from the pleadings and the stipulated facts that the challenged statutes impose an excise tax on the privilege of engaging in interstate commerce.

2. The challenged statutes having been construed by the Supreme Court of the State of New Mexico as imposing an excise tax on the use of gasoline, and not as compensation for the use of a State facility, to-wit, the State highways of the State of New Mexico, the Federal courts are bound by the construction placed upon the act by the State Supreme Court, and must follow such construction, as was definitely held in the three-judge court opinion in this case.

E. R. WRIGHT,
Santa Fe, New Mexico,
EARL A. BAGBY,
560 *So. Los Angeles St.,*
Los Angeles, California,
Attorneys for Appellee.

STATEMENT OF APPELLEE IN OPPOSITION TO JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

Filed October 4, 1935, Nunc pro Tunc as of August 30, 1935.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO.

This statement in opposition to the jurisdiction of the Supreme Court of the United States is filed pursuant to the provisions of Paragraph 3 of Rule 12 of the Rules of the Supreme Court.

I.

The period covered by this litigation runs from April, 1932, to the present time. There are two challenged State statutes:

Chapter 29, New Mexico Session Laws, 1929, Sec. 60-101, New Mexico Statutes Annotated, Compilation of 1929, which is as follows:

> "There is hereby levied and imposed an excise tax of five cents per gallon upon the use of all gasoline and motor fuel used in this State for any purpose; provided, that in the collection of such tax a deduction shall be allowed of the amount of the excise tax paid in this State by distributors or dealers upon the sale of the gasoline so used."

The title to this statute provides:

> "An Act to Amend Section 1 of Chapter 14 of the Laws of 1927, Providing for an Excise Tax on the Use of Gasoline."

The title to said Chapter 14 of the Laws of 1927 reads as follows:

> "An Act Providing for an Excise Tax upon the Use of Gasoline and Motor Fuel."

This was the applicable statute from April, 1932, to the effective date of the 1933 Act, Chapter 176 of the Session Laws of 1933, which Act was entitled:

> "An Act to Codify and Revise the Gasoline and Motor Fuels Excise Tax Laws; to Define Gasoline and Motor Fuels and other Terms; to Levy an Excise Tax of Five Cents Per Gallon; to Provide for the Licensing of All Distributors and Retail Dealers and Bonding of Distributors; to Provide for Reports from Distributors, etc."

The specific section of the Act involved in this case reads as follows:

> "There is hereby levied and imposed an excise tax of five cents (5¢) per gallon upon the sale and use of all gasoline and motor fuel sold or used in this State for any purpose, except gasoline sold in interstate commerce."

This statute became effective the 12th day of June, 1932, and is still in effect.

Pertinent State statutes having a bearing on the constitutionality of the challenged statutes are Chapter 129 of the Session Laws of 1929, entitled:

> "An Act Relating to the Supervision and Regulation of the Business of Operating Motor Vehicles as Common Carriers upon the Public Highways, and Prescribing Compensation to be Paid for the Use of Such Highways in Carrying on Such Business."

This Act provides generally for the regulation of common carriers, provides for either a certificate of registration or

a certificate of public convenience and necessity, and fixes and prescribes the fees to be paid for the use of the highways on the basis of a mileage tax determined by the carrying capacity of the particular vehicle.

The language of Section 7 (Sec. 11-1007, 1929 Compilation) reads as follows:

> "In addition to the regular license fees and taxes imposed upon motor vehicles, there shall be paid by and collected from every motor vehicle carrier, except those specifically excluded from the provisions of this act, the following charges as compensation for the use of the public highways and the maintenance, repair and reconstruction of the same."

This Act was in effect until March 15, 1933.

Chapter 154 of the Session Laws of 1933, entitled:

> "An Act Relating to the Supervision and Regulation of the Business of the Transportation by Motor Vehicles for Hire Over the Public Highways of the State of New Mexico; Prescribing the Compensation for the Use of Such Highways and Carrying on Such Business and Repealing Such Parts of Chapter 129, Laws of New Mexico of 1929, Chapter 52, Laws of New Mexico of 1931, and All Other Laws of the State of New Mexico as Are in Conflict Herewith."

This Act is a codification and revision of Chapter 129 of the Session Laws of 1929, and includes, in addition to common carriers, contract carriers, and provides for the issuance of certificates of registration and/or certificates of public convenience and necessity, prescribes the fees and fixes a mileage tax to be paid by contract and common carriers.

The language of Section 39 provides:

> "In addition to the regular license fees and taxes imposed upon motor vehicles, there shall be assessed against and collected from every such carrier, for the administration of this act and for the maintenance, repair and reconstruction of public highways, a mileage tax which shall be imposed as follows:"

This Act became effective March 15, 1933, and is still in effect.

Chapter 31 of the Session Laws of 1931, entitled:

> "An Act to Provide for Refunding the Excise Tax Paid on Gasoline and Motor Fuel Purchased and Used by Consumers Other than in Motor Vehicles Operated or Intended to Be Operated on Any Public Streets or Highways of the State of New Mexico," etc.

This Act merely provided for a system of refunds to those purchasing gasoline from licensed distributors within the State of New Mexico where the gasoline was *not* used in the operation of motor vehicles on the public highways.

We have cited and quoted the various statutes of the State of New Mexico pertinent to this inquiry because of the decision rendered by the Supreme Court of the State of New Mexico on March 31, 1930, in the case of *Breece Lumber Company* v. *Mirabal*, 34 N. M. 643, 287 P. 699, affirmed by the Supreme Court of the United States at 283 U. S. 788.

II.

The Nature of the Case.

The appellants, in the Statement of Jurisdiction, under subheading C, "Nature of the Case", take the position:

> "The only question really involved in the case is whether or not the laws of the State of New Mexico

levy a tax on gasoline bought by an interstate carrier outside of the State of New Mexico and placed in the vehicles of the interstate carrier outside of the State of New Mexico and used for the propulsion of said vehicles over the highways of the State of New Mexico."

And again, under sub heading D, "Cases Sustaining Jurisdiction", counsel for the appellants repeat the statement, coupled with the assertion that the decisions cited under said sub-division are believed by counsel to sustain the jurisdiction of this Court on this appeal.

With this assertion as to the scope of the question involved, counsel for the appellee cannot agree. By referring to the complaint in this case and to the stipulated facts it will be noted that the plaintiff bus company, appellee here, raises two major questions:

First, whether or not, in any case, an excise tax may be lawfully levied upon interstate commerce as distinguished from a toll or rental charge for the use of a State facility.

As an excise tax on the privilege of use, the facts in the case at bar bring the case squarely within the doctrine of *Helson and Randolph* v. *Kentucky,* 279 U. S. 245.

The toll or rental theory for the use of a State facility is clearly set out in the following cases:

Parkersburg and Ohio River Transportation Co. v. *Parkersburg,* 107 U. S. 691;
Huse v. *Glover,* 119 U. S. 543;
Monongahela River Co. v. *United States,* 148 U. S. 312;
Minn. Rate cases, 230 U. S. 352.

All of which cases are cited by the Supreme Court of the United States in the opinion in the case of *Hendrick* v. *Maryland,* 235 U. S. 610.

Second: Can the tax imposed by Chapter 29 of the New Mexico Session Laws of 1929, or Chapter 176 of the Session

Laws of 1933, be sustained as a charge for the use of State facilities, rather than an excise tax on the privilege of interstate commerce?

Interstate Transit, Inc. v. *Lindsey,* 283 U. S. 183.

Chapter 29 of the New Mexico Session Laws of 1929, Sec. 60-101 of the New Mexico Statutes, Annotated, Compilation of 1929, was directly construed by the New Mexico Supreme Court in the case of *Breese Lumber Company* v. *Mirabal,* 287 P. 699, affirmed 283 U. S. 788. In the case last cited the court specifically held that the 1929 Act was an excise tax and not compensation for the use of the highways. On rehearing in this case, attention was called to Chapter 31 of the Session Laws of 1931, being the gasoline and motor fuel refund act. The court held that this Act did not change the character of the gasoline tax statute, and adhered to its position that it was an excise tax and not compensation for the use of the highways.

The language of Chapter 176 of the Session Laws of 1933 is identical with the earlier act. This position was reiterated in the case of *Transcontinental Air Co.* v. *Lujan,* 8 P. (2d) 103.

The statute, having been construed by the New Mexico Supreme Court, the Federal court is bound to follow the Supreme Court's interpretation and construction of the Act.

Terry v. *Midwest Refining Co.,* 64 F. (2d) 428;

Warburton v. *White,* 176 U. S. 484;

Jones v. *Prairie Oil and Gas Co.,* 273 U. S. 195.

Third: In addition to the two major questions submitted, appellee calls the Court's attention to the complaint in this case and to paragraph nine of the stipulated facts, which present an additional question squarely presented by the pleadings, which, however, was not directly ruled upon by the three-judge court, in view of the holding of the court to

the effect that the tax imposed by the Act was an excise tax imposed upon an interstate commerce, and, therefore, void.

The pleadings and the stipulated facts also present other incidental questions which will be properly raised if the case is heard upon the issues presented by the pleadings and the facts.

Respectfully submitted,

E. R. WRIGHT,
Santa Fe, New Mexico.
EARL A. BAGBY,
560 *So. Los Angeles St.,*
Los Angeles, California,
Attorneys for Appellee.

(6996-C)